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No. 82-666

In the Supreme Court of the United States

OCTOBER TERM, 1982

MILLER BREWING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. In this case the Board found (Pet. App. A26-A79) that petitioner Miller Brewing Company violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), when it discharged two union stewards for participating in a walkout that violated a no-strike provision in the applicable collective bargaining agreement, but imposed much less severe sanctions on rank-and-file employees participating in the same walkout. In reaching this conclusion, the Board applied its rule that, while employers are free to discipline any employee, *including* any employee who holds union office, for violating a no-strike clause, and may also punish acts of actual strike leadership more severely than mere participation, they are barred by Section 8(a)(3) and (1) of the Act from predicating harsher discipline simply on an employee's status as a union officer. Here, the Board found that the stewards had initially tried

to dissuade the employees from walking out and that they had not acted as leaders of the walkout when it occurred (Pet. App. A71-A73). Hence, the Board concluded (*id.* at A76) that the especially severe sanction imposed on the stewards was imposed on them simply because they were union stewards, and that petitioner thereby unlawfully discriminated against them on the basis of union-related considerations.

2. The court of appeals enforced the Board's order (Pet. App. A1-A25). It concluded that the Board's finding that the stewards were not actual leaders of the walkout was supported by substantial evidence (*id.* at A11-A12), and it agreed with the Board's finding that the selective discipline meted out to the stewards violated Section 8(a)(3) and (1) of the Act, since the union had not contractually consented to the imposition on union officers of any special duty different from the duty imposed generally on all employees to abide by the no-strike clause (Pet. App. A20-A24).[1]

DISCUSSION

The question petitioner presents in this case is "[w]hether union officials may be held to a higher duty than rank-and-file employees to uphold a collectively bargained no-strike

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[1]With respect to the contractual question, the court held that a general no-strike clause is not a sufficient waiver by the union of employees' rights to hold union office free of the threat of a more severe standard of discipline than that applied to rank-and-file employees (Pet. App. A15). It further held that petitioner was barred by Section 10(e) of the Act, 29 U.S.C. 160(e), from presenting to the court its contention that an arbitrator's award upholding the stewards' discharges constituted a basis for finding that the agreement clearly imposed higher duties on union officers. Petitioner had neither presented that theory to the Board nor shown extraordinary circumstances excusing its failure to do so, and the arbitral award had not been made a part of the administrative record (Pet. App. A15-A20). See *Woelke & Romero Framing Inc.* v. *NLRB*, No. 80-1798 (May 24, 1982), slip op. 20-21.

agreement, including an obligation to take affirmative steps to deter or end any action in breach thereof, and whether an employer commits an unfair labor practice by selectively disciplining union officers for failing to satisfy that duty" (Pet. I). As petitioner concedes (Pet. 6 n.2), that question is also presented in *Metropolitan Edison Co.* v. *NLRB*, cert. granted, No. 81-1664 (June 14, 1982). The briefs of all the parties have been filed in the latter case, and petitioner has filed a brief as amicus curiae in support of Metropolitan Edison. Petitioner offers no reason why there should also be full briefing and oral argument in this case.

It is therefore respectfully submitted that the petition for certiorari should be held and disposed of in light of the Court's decision in No. 81-1664, *Metropolitan Edison Co.* v. *NLRB*.[2]

Respectfully submitted.

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NOVEMBER 1982

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[2]A copy of the Board's brief in *Metropolitan Edison* has been served on petitioner.

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